United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7263

SAMUEL JELFO,
JOSEPHINE TAYLOR, and
EDISON C. SCHULZ, on
behalf of themselves and
all others similarly situated,

Appellants,

-against-

HICKOK MANUFACTURING COMPANY, INC.,

Appellee

On Appeal From the
United States District
Court for the Western
District of New York

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT

This is an appeal by plaintiffs from an order of the District Court for the Western District of New York denying their motion, pursuant to Rule 23(c)(1. of the Federal Rules of Civil Procedure, that this action may be maintained as a class action. The decision below, by Honorable Harold

P. Burke, District Judge, was filed April 9, 1975. It is unreported and appears as Record Item 9.*

The District Court held that this action may not proceed as a class action because (1) there was "no showing that the interest[s] of the members of the various subclasses will be fairly and adequately protected under the present status of the case," (2) there was a "danger of lack of protection for all of the subclasses," and (3) there was "no showing that any of the named plaintiffs are personally interested in pursuing this case actively."

QUESTION

The issue before this Court, if it has jurisdiction to hear this appeal, is whether the District Court's holding, that this action may not now proceed as a class action, was erroneous.

FACTS

For several years prior to 1972, defendant-appellee Hickok Manufacturing Company, Inc. ("Hickok") maintained manufacturing facilities in Rochester, New York. For much of that time, many of Hickok's Rochester employees, including appellants here, were represented by the Rochester Independent Union ("the Union"). Hickok and the Union negotiated and

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*Pursuant to Fed. R. App. P. 30(f), plaintiffs-appellants moved that this Court dispense with the requirement of an appendix. The motion was granted on June 23, 1975, and, accordingly, this appeal is being heard on the original record.

entered into a number of successive collective bargaining agreements, the last of which expired by its terms on July 31, 1972.

Pensions were a subject of many of the successive collective bargai .ing agreements, including the last one. In that last collective bargaining agreement, pensions were referred to in Article XVIII, which is attached as Exhibit A to the Nadler Aff't., Record Item 7. The relevant provisions of Article XVIII were as follows:

> "ARTICLE XVIII - 'Retirement'
>
> Section 1. Effective August 1, 1970, the Company shall maintain a funded pension paying benefits . . . . The changes from prior contracts represented in this clause are subject to the approval of the Internal Revenue Service. . . .
>
> Section 2. A twenty-five (25) year continuous service employee shall have vested rights to pension payments under the funded pension plan at age sixty-two (62) if he has left the Company prior to his sixty-second (62) birthday through no fault of his own. . . .
>
> An employee with a minimum of twenty-five (25) years' continuous service shall have vested rights to a pension under the funded pension plan at age sixty-two (62) if he left the employ of the Company for any reason, except discharge for just cause based on bad conduct, prior to his sixty-second (62nd) birthday. . . .
>
> This Section applies only to those employees leaving the employ after July 1, 1964 and is subject to the approval of the Internal Revenue Service.
>
> . . . .
>
> Section 7. Employees who are totally and permanently disabled having a minimum of fifteen (15) years of service shall be eligible to draw

their pension at age sixty-two (62), their entitlement being based upon twenty-five (25) years of service for a full pension. . . .

Employees who are totally and permanently disabled and with twenty-five (25) or more years of service shall be eligible to receive their full pension, after six months of disability. . . .

Section 8. Employees who are laid off for two (2) years or more with a minimum of fifteen (15) years of service shall be eligible to draw their pension upon reaching age sixty-two (62) on the basis of 80% pro rata as explained in Section 2, or 100% if claimed at age sixty-five (65), their entitlement being based on twenty-five years of service for full benefits.

. . . .

Section 10. The Company shall submit a copy of the proposed plan to the Rochester Independent Union before submission to the Internal Revenue Service and provided a copy after approval. Whenever approved by the Internal Revenue Service, any changes shall be considered as incorporated in Article XVIII." (Emphasis added).

Pursuant to Article XVIII and the corresponding provisions in the predecessor collective bargaining agreements, Hickok established the Hickok Revised Basic Pension Plan ("Plan") as a funded pension plan and, pursuant thereto, entered into a Group Annuity Contract with Connecticut General Life Insurance Company ("Connecticut General"). The agreement with Connecticut General provided in relevant part as follows:

> "DATE OF DISCONTINUANCE. 1. Upon written notice which may be given as provided in (a) or (b) below, contributions under this contract shall be discontinued as of the date specified in such notice or as of the date 15 days after such notice is received, if later:
> (a) The contract holder may give such notice to the Insurance Company at any time. . . ."

Similarly, the Plan itself provided in relevant part as follows:

> "The Company may, without the assent of any other party, amend, alter, terminate or modify the Plan at any time, except that if there is then in force a contract with any union representing employees of the Company in which the terms of this Plan are specified or outlined, no amendment may be made without the consent of the union."

Both the Plan and the Group Annuity Contract also contain detailed provisions for the administration of the Plan after termination. Basically, those provisions provide that the funds remaining in the pension trust fund will be first used toward paying the pension entitlements of those already receiving pensions before those who might have pension entitlement but had not yet started receiving pensions. Pursuant to those documents, none of the money, whether principal or income, has reverted or will revert to Hickok.

On or about September 25, 1972, after the last collective bargaining agreement had expired on July 31, 1972, and after Hickok and the Union had bargained to impasse over

the discontinuance of the Plan, Hickok notified its employees and former employees that the Plan would be terminated. This termination had the practical effects -- pursuant to the termination provisions of the Plan itself -- of reducing the future pension payments to those who were already receiving pensions and of making no funds available to those who were not then receiving pensions but who might have later qualified. Since that time, Connecticut General has administered the Plan in accordance with its terms; appellants apparently agree that all the terms of the Plan have been complied with.

The complaint, brought under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, was filed 13 months later. By that time, Hickok had discontinued all of its Rochester operations.

THE UNDERLYING MERITS

While the only issue raised by appellants before this Court is whether the District Court erred in denying class action status, we agree (Appellants' Br. 6) that the underlying merits are relevant to a consideration of the class action aspects of the case. For example, the Court's view of adequacy of representation will depend on the issues being raised and on the people being represented.

The basic disputes between the parties on the merits are (1) the source of any pension right or entitlement of any

of Hickok's former employees and (2) the source of any funds that must be used to make payments to those who have pension entitlement. The questions of whether a former employee qualifies for a pension, and whether a former employee actually receives a pension, are, of course, distinct.

It is appellants' position that the answer to both questions is found in the collective bargaining agreements. In other words, they contend that the collective bargaining agreements define those who qualify for a pension and obligate Hickok to pay such a pension for the individual's life. They apparently contend that the Plan was merely a funding mechanism entered into for Hickok's convenience, and that, once the Plan has been terminated, the necessary pension payments must be made from the corporate treasury.

It is Hickok's position, however, that the answer to both questions is found in the Plan, which Hickok was obligated to enter into by the collective bargaining agreements. In other words, Hickok contends that the terms of the Plan are controlling and both define those who qualify for a pension and create, via the pension trust fund, the source of funds for making payment. Hickok does not, of course, contend that the collective bargaining agreements are irrelevant to the pension issue; those agreements clearly obligated Hickok to enter into the Plan and even outlined some of the terms that were required to be in the Plan.

Further, termination of the Plan while a collective bargaining agreement was still in effect would undoubtedly have constituted a breach of the collective bargaining agreement. Here, however, termination of the Plan occurred while no collective bargaining agreement was in effect and after Hickok and the Union had bargained to impasse.

THE MOTION BELOW

Fourteen months after the complaint was filed,* appellants moved the District Court for an order that the action may proceed as a class action. Attached to the moving papers (Record Item 6) were schedules of what they claimed were the three groups sought to be represented by the three named plaintiffs.

Schedule A listed a group of former Hickok employees who had already retired, who had begun receiving pensions, and whose pensions have been reduced. The schedule contains 160 names, including plaintiff Jelfo.

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* The complaint (Record Item 2) was filed October 29, 1973. The notice of the class action motion and supporting papers (Record Item 6) were filed December 23, 1974. The oral deposition noticed by Record Item 4 was not held, and an earlier class action motion (Record Item 5) was withdrawn in favor of the one decided by the District Court. Other than the pleadings and the class action motion, nothing has happened in the District Court. This is in contrast, we submit, both to the moving affidavit's assertion (Record Item 6 ¶8) that "[s]ince the commencement of this action, it has been diligently prosecuted" and to the mandate of Fed. R. Civ. P. 23(c)(1) that the class determination be made "[a]s soon as practicable" after the commencement of the action.

Schedule B listed a group of former Hickok employees who had not yet retired, consisting actually of two groups: (1) former employees with 25 or more years of service who had not yet retired and (2) former employees with 15 or more years of service, who were between ages 62-65, and who also had not yet retired. The first group contains 105 names (pages B-1 through B-5 of Schedule B), including plaintiff Schulz. The second group contains 17 names (page B-6 of Schedule B), including no named plaintiff.

Schedule C listed a group of former Hickok employees who had already retired because of disability. The schedule contains only 3 names, including plaintiff Taylor.

At Hickok's suggestion, and with appellants making no objection, the District Court treated the groups as putative subclasses, pursuant to Rule 23(c)(4)(B). The District Court denied the motion because it found that there was "no showing that the interest[s] of the members of the various subclasses will be fairly and adequately protected under the present status of the case." Further, the District Court found that there was a "danger of lack of protection for all of the subclasses." A separate ground for denying class action status was that there was "no showing that any of the named plaintiffs are personally interested in pursuing this case actively." Record Item 9.

ARGUMENTS

I

THIS COURT LACKS JURISDICTION OVER THIS APPEAL, AND THE APPEAL SHOULD BE DISMISSED.

Appellants are in this Court on an appeal from the denial of their class action motion. Although the District Court's order left pending in that court the merits of the action on behalf of the three named plaintiffs, appellants argue that the denial of class action status constituted the "death knell" of their action. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) ("Eisen I"). As such, appellants argue that the order is, for practical purposes, a "final order" appealable under 28 U.S.C. § 1291.*

In Eisen I, this Court held that the denial of class action status can be appealable under 28 U.S.C. § 1291 in situations in which the action is for practical purposes ended. The basis for that conclusion, both in Eisen I and in subsequent cases in this Court, has been the assumption that, without class status, the named plaintiffs would abandon a difficult case that could result only in a small recovery. "We can safely assume that no lawyer of competence is going

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* Appellants made no application to the District Court for leave to prosecute an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

to undertake this complex and costly case to recover $70 . . . ." Eisen I, supra, 370 F.2d at 120; see also Korn v. Franchard Corp., 443 F.2d 1301, 1306 & n.8 (2d Cir. 1971) (claims of $386 plus intervenors' claims of $1,930: appeal allowed); Green v. Wolf Corp., 406 F.2d 291, 295 & n.6 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (total damage of less than $1,000, "enormously complex and expensive action": appeal allowed). But where the amount involved is sufficient that it may be presumed that the named plaintiffs will continue to press their individual claims, the "death knell" doctrine is inapplicable, and an inter-locutory appeal is not allowed under 28 U.S.C. § 1291. E.g., Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974) (claim of $7,482); Milberg v. Western Pacific R. Co., 443 F.2d 1301, 1306-07 (2d Cir. 1971) (combined claims of $8,500); Caceres v. International Air Transport Assoc., 422 F.2d 141 (2d Cir. 1970) ($150,000); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

In Eisen IV, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court did not have occasion to pass on this Court's "death knell" doctrine, at least partly because the appeal there was from an order granting, rather

than denying, status.* The Court held only that allocations of the expense of notice were appealable as "collateral orders" under the doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). 417 U.S. at 172. See Parkinson v. April Industries, Inc., supra, slip op. at 4478 n.7; General Motors Corp. v. City of New York, supra, 501 F.2d at 646 n.14.

Of course, the "death knell" doctrine has not escaped question even from this Court, both before Eisen IV, e.g., Kohn v. Royall, Koegel & Wells, supra, 496 F.2d at 1095 n.6, 1099; Herbst v. International Telephone & Telegraph Corp., supra, 495 F.2d at 1317-19 (Danaher, J., concurring); id. at 1325 (Mulligan, J., concurring); Shayne v. Madison Square Garden Corp., supra, 491 F.2d at 400-01, 401 n.11; Eisen v. Carlisle & Jacquelin (Eisen III), 479 F.2d 1005, 1007 n.1 (2d Cir. 1973), vacated, 417 U.S. 156 (1974); Korn v. Franchard Corp., supra, 443 F.2d at 1305; id. at 1307 (Friendly, J., concurring); City of New York v. International Pipe & Ceramics Corp., supra, 410 F.2d at 300-01 (Hays, J., dissenting), and after Eisen IV, e.g., Parkinson v. April Industries, Inc., supra, slip op. at 4481-85 (Friendly, J., concurring).

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* In response to Judge Friendly's criticism in Korn v. Franchard Corp., supra, 443 F.2d at 1307, that the doctrine favored only plaintiffs, this Court developed a doctrine by which some orders granting class status may be appealed. E.g., Herbst v. International Telephone & Telegraph Corp., 495 F.2d 1308 (2d Cir. 1974); Kohn v. Royall, Koegal & Wells, 496 F.2d 1094 (2d Cir. 1974); General Motors Corp. v. City of New York, 501 F.2d 639, 644 (2d Cir. 1974); Parkinson v. April Industries, Inc., slip op. 4465 (2d Cir. June 30, 1975) (Docket Nos. 74-2058, 74-2214); Handwerger v. Ginsberg, slip op. 4865 (2d Cir. July 16, 1975) (Docket No. 75-7095).

Additionally, the doctrine has been rejected in other circuits. E.g., King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972).

Although it is possible that this Court is now prepared to reject the "death knell" doctrine, see Parkinson v. April Industries, Inc., supra, slip op. at 4481-85 (Friendly, J., concurring), it need not do so in order to dismiss the instant appeal. For, even under the doctrine as it now stands, this Court lacks jurisdiction under 28 U.S.C. § 1291.

Unfortunately, the record before this Court does not fully disclose the precise amounts of the monetary claims of the named plaintiffs. In the case of appellant Schulz, however, sufficient estimation may be made to disclose his substantial personal stake. He is a member of the putative subclass of 25-year employees who had not yet retired; although the record does not disclose whether he has more than 25 years of service, it discloses that he has at least that many. If he retires after August 1, 1971, at age 65 with exactly 25 years of service and if he is later held entitled to

receive a pension under Article XVIII of the last collective bargaining agreement (contrary to Hickok's position), he would receive, according to the schedule in Section 1 of Article XVIII, $68.75 per month, or $825.00 per year. If at age 65 his life expectancy (assuming him to be a white male) were 13.2 years, see 2 New York Pattern Jury Instructions -- Civil, App. A at 702 (2d ed. 1974), taken from 2 United States Dept. of Health, Education and Welfare, Vital Statistics of the United States: Life Tables § 5 (1971), his total claim is $10,890 ($825.00 per year times 13.2 years). The present value of $825.00 to be received at the end of the year each year for 13 years (using 6% compound interest) is $7,301.25. 2 New York Pattern Jury Instructions, supra, App. C at 718.

In Shayne v. Madison Square Garden Corp., supra, 491 F.2d at 402, a claim of $7,482.00 was held sufficiently large so that denial of class action status did not administer the "death knell" of the action. Here, appellant Schulz's claim alone is only $180.75 below the Shayne amount and is far above the amounts involved in the cases where appeals have been allowed. Further, that amount is the present value only of appellant Schulz's claim.* The record does not disclose the amounts of the claims of the other two appellants, but some amount must be added to cover these two claims. Korn

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* His claim would be even more if he has worked more than 25 years.

v. Franchard Corp., supra, 443 F.2d at 1306 n.8; Milberg v. Western Pacific R. Co., supra, 443 F.2d at 1306. If their claims were only $1,000 each, the total claims of the named plaintiffs would be above the $8,500 involved in Milberg. See also Gosa v. Securities Investment Co., 449 F.2d 1330, 1332 (5th Cir. 1971) (individual claim of $3,322.20: no appeal under "death knell" doctrine), cited with approval in Shayne v. Madison Square Garden Corp., supra, 491 F.2d at 402.

What appellants seek, then, is this Court's consideration of sophisticated and difficult class action issues without having satisfied the jurisdictional requirements of either 28 U.S.C. § 1291 or 28 U.S.C. § 1292(b). We urge that their appeal be dismissed.

Because appellants have briefed the merits of the appeal, and because Hickok has not filed a formal motion to dismiss the appeal,* the remaining portions of this brief will deal with the merits of the appeal.

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* Such a motion is not necessary for this Court to dismiss for lack of appellate jurisdiction. Appeals were dismissed for lack of jurisdiction without motion and even though the appeal had been argued in Shatluck v. Hoegl, slip op. 4839 (2d Cir. July 16, 1975) (Docket No. 74-1767), and in Parkinson v. April Industries, Inc., supra.

II

THE VARIOUS GROUPS WERE APPROPRIATELY CONSIDERED AS PUTATIVE SUBCLASSES.

Appellants argue that it was error for the District Court to consider the various groupings of former employees as subclasses, although they did not raise that point below or object to their motion's being so considered.* The principal basis for the asserted error is apparently that appellants' motion requested certification only of a single class, rather than of subclasses. (Appellants' Br. 11-12). We submit, however, that the court below properly treated the various groupings as putative subclasses and was not bound by the label appellants attached to their motion papers.

Rule 23(c)(4) authorizes the recognition of subclasses "[w]hen appropriate." Such recognition may be appropriate either upon application of the named plaintiffs, see Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 179 n.16, or upon the court's own initiative, see id. at 183-85 (Douglas, J., dissenting in part). The definitions of a single class proposed by the named plaintiffs were rejected, and subclasses created, in Dorfman v. First Boston Corp., 62 F.R.D. 466, 476 (E.D. Pa. 1973); Price v. Skolnik, 54 F.R.D. 261, 264, 265

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* Hickok's view of appellants' motion as one seeking certification of subclasses, which is, of course, permissible under Rule 23(c)(4)(B), was first disclosed in the Nadler Aff't., Record Item 7. Thereafter, appellants' attorney filed a reply affidavit, Record Item 8, which vigorously disputed Hickok's view that the Plan was the controlling document but which did not dispute Hickok's subclass position.

(S.D.N.Y. 1971); Rios v. Enterprise Assoc. Steamfitters Local No. 638, 54 F.R.D. 234, 235-37 (S.D.N.Y. 1971); and Dolgow v. Anderson, 43 F.R.D. 472, 491-93 (S.D.N.Y. 1968).

In fact, a contrary rule binding the District Court to whatever definition is proposed by the named plaintiffs would make little sense in the flexibility-oriented policy behind Rule 23. See Dolgow v. Anderson, supra, 43 F.R.D. at 492. Only by allowing the District Courts this flexibility can otherwise confusing issues involving distinct claims of distinct groups be identified and dealt with. See Rios v. Enterprise Assoc. Steamfitters Local No. 638, supra, 54 F.R.D. at 237. The definition of the proposed class or subclass is, after all, of central importance to the application of other Rule 23 requirements -- for example, adequacy of representation and common questions of law and fact -- and the District Courts should be able to forge workable definitions.

What appellants fail to recognize is that a subclass is nothing more than that -- a smaller grouping within an already existing and larger grouping. See Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 179 n.16; id. at 180 n.1 (Douglas, J., dissenting in part). Use of the term "subclass" does not deny the existence of a "class;" it reaffirms it. The Advisory Committee Note to Rule 23(c)(4), for example, recognizes that a subclass is a division of "a class." 39 F.R.D. 98, 106 (1966).

In fact, despite appellants' protestations that the subclass lines should not be drawn the way Hickok suggests, their proposed single class is really a subclass itself. Paragraph NINTH of the Complaint (Record Item 2) refers to "the Class of former employees of the defendant, for whose benefit the said Collective Bargaining Agreements were made." This presumably includes all former Hickok employees, and paragraph NINTH states that they number about 600. But even appellants do not claim that all former Hickok employees are entitled to receive pensions. For example, the parties agree that former employees with less than 15 years of service and who have not attained age 62 have no pension entitlement at all and never did. Accordingly, the motion below (Record Item 6) recognized this and sought certification only of a 285-person class "comprised of plaintiffs and others similarly situated, namely, those former employees of defendant who are entitled to receive benefits pursuant to Retirement and Other Benefits provided for in Collective Bargaining Agreements entered into between the defendant and the Rochester Independent Union, and whose benefits have been reduced, discontinued or repudiated by defendant in breach of said Collective Bargaining Agreements." That proposed "class" is itself nothing more than a subclass within the group of all former Hickok employees.

Appellants' contention that the District Court lacked the discretion to deal with other than their proposed single-class definition really wins them nothing. Their own definition -- those who "are entitled to receive benefits" -- assumes the underlying merits of the case. Under that proposed definition, neither the parties nor the court could tell whether the action was a class action, or who might be in the class, until the trial was concluded and final judgment entered. Accordingly, if the District Court was limited to passing solely on appellants' proposed definition, it was required to deny their motion.

The issue, then, is when creation of subclasses may be "appropriate" within the meaning of Rule 23(c)(4) and within the District Court's discretion. The Advisory Committee Note to Rule 23(c)(4) indicates that a class should be divided into subclasses when the subclasses are "divergent in interest." 39 F.R.D. at 106. Divergent interests need not be conflicting interests -- they need only be different interests and such that it is useful for the trial court to treat them separately or differently.* In Price v. Skolnik, supra, 54 F.R.D. at 265, the same plaintiffs were allowed to represent separate sub-

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* However, appellants' argument in this Court that their groupings should not be treated as subclasses is probably a recognition that there is serious conflict among the subclasses here. See pp. 21-32, infra.

classes, which would have been impermissible if the subclasses' interests had conflicted. In Dolgow v. Anderson, supra, 43 F.R.D. at 492, overlapping subclasses were allowed. Subclasses of past employees and present employees were recognized in Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972).

Professor Moore believes that the creation of subclasses is "appropriate" both where the subclasses have "divergent interests" and "where certain representatives adequately represent only one group and other representatives represent another group." 3B Moore's Federal Practice ¶ 23.65 at 23-1251 (2d ed. 1974), citing Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). Again, no actual conflict of interest is necessary. In Dorfman v. First Boston Corp., supra, 62 F.R.D. at 476, one named plaintiff represented a subclass of debentureholders who had purchased the securities during one time period, and another named plaintiff represented a subclass of debentureholders who had purchased the securities during a different time period. In Rios v. Enterprise Assoc. Steamfitters Local No. 638, supra, a subclass was created to be represented by one of the named plaintiffs merely because he "occupies a somewhat different position." 54 F.R.D. at 236.

Similarly, the Supreme Court indicated in Eisen v. Carlisle & Jacquelin, supra, that a subclass might be appropriately created merely as a smaller group of the larger class. 417 U.S. at 179 n.16; see also id. at 180 n.1 (Douglas, J., dissenting in part).

Here, appellants' own moving papers identified the subclasses, each listed on a separate schedule. The moving affidavit itself (Record Item 6) deals separately (¶3) with retired former employees who were already receiving pensions and with employees who had not yet retired. The District Court's recognition of appellants' listings for precisely what they are -- subclasses within the larger group of all former Hickok employees -- was not only not error, but was entirely appropriate and within its discretion.

III

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT, UNDER THE PRESENT STATUS OF THE CASE, THERE WAS NO SHOWING THAT THE INTERESTS OF THE MEMBERS OF THE VARIOUS SUBCLASSES WILL BE FAIRLY AND ADEQUATELY PROTECTED.

With the various groupings considered as subclasses, Rule 23(c)(4) requires each of the Rule 23 requirements to be considered with respect to each subclass separately.

The District Court, apparently focusing on Rule 23(a)(4)'s requirement of fair and adequate protection for the interests of all members of each subclass, held that there was

"no showing that the interest[s] of the members of the various subclasses will be fairly and adequately protected under the present status of the case. There is danger of lack of protection for all of the subclasses." (Record Item 9). That holding is valid and should be affirmed.

The District Court's holding should be understood for its limited extent. The court below did not hold that the representation of the named plaintiffs would be inadequate. The holding was only that there was no showing that such representation would be adequate. The burden was on the named plaintiffs to demonstrate compliance with each of the requirements of Rule 23, Philadelphia Elec. Co. v. Anaconda American Brass Co., supra, 43 F.R.D. at 457; Carroll v. Associated Musicians, 206 F. Supp. 462, 470 (S.D.N.Y. 1962), aff'd, 316 F.2d 574 (2d Cir. 1963); D&A Motors, Inc. v. General Motors Corp., 19 F.R.D. 365 (S.D.N.Y. 1956), with a "positive showing," DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968).

In the instant case, the danger of lack of full protection for all subclasses arises because the members of the putative subclasses assert divergent and potentially conflicting arguments. The former employees who had already retired and who were already receiving pensions would have their pensions much reduced if additional people are allowed to participate in the finite pension trust fund maintained by Connecticut General. Such a reduction would come about if the former employees who had not yet retired are held entitled

to pensions upon their eventual retirement and if their entitlement is held to be payable only from the pension trust fund, rather than from the Hickok corporate treasury.

Such divergent interests are sufficient alone to defeat class action status. "Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action." Carroll v. American Federation of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), vacated, 391 U.S. 99, rehearing denied, 393 U.S. 902 (1968).

The conflicts and potential conflicts between and among the various subclasses may be easily summarized. They demonstrate, we submit, the District Court's accuracy in assessing the lack of adequate protection for all of them.

The first difference is between those former Hickok employees who had already retired and had started receiving pensions and those former Hickok employees who had not yet retired. While appellants apparently argue that the various collective bargaining agreements obligated Hickok to pay a pension to employees who retire, and that the obligation continues throughout the former employee's period of retirement, the words of Section 1 of Article XVIII of the last collective bargaining agreement required Hickok only to "maintain a funded pension paying benefits." But, Hickok did maintain a funded pension plan that pays pension benefits, and that same funded pension plan continues to pay pension benefits.

Further, the extent of Hickok's obligation even to maintain a funded pension plan may be a subject of dispute among the subclasses. As to those employees who had not yet retired, any Hickok obligation under the collective bargaining agreements continued only for the life of the respective collective bargaining agreement, or until Hickok's bargaining obligations thereafter were satisfied.

At the expiration of the last collective bargaining agreement, July 31, 1972, the extent and continuation of any pension rights for still-active employees was a mandatory subject of collective bargaining between Hickok and the Union. E.g., Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159 (1971).

That is exactly what happened in the instant case. Hickok and the Union bargained as to termination of the Pension Plan, and they bargained to impasse on that issue. Nadler Aff't. (Record Item 7) ¶ 10. There is nothing in the record to suggest that the bargaining was other than in good faith or that the impasse was other than genuine, and the Union filed no unfair labor practice charges with the National Labor Relations Board. When the parties' good faith bargaining efforts resulted in a genuine impasse, Hickok was free unilaterally to implement its last good faith position on the

subject. Stratford Industries, 215 N.L.R.B. No. 117 (1974); Chemical Producers Corp., 183 N.L.R.B. No. 18 (1970); Taft Broadcasting Co., 163 N.L.R.B. No. 55 (1967), review denied sub nom. Television & Radio Artists v. N.L.R.B., 395 F.2d 622 (D.C. Cir. 1968). Hickok did that and terminated the Pension Plan.

That appellants dispute Hickok's right unilaterally to implement its last good faith bargaining position upon impasse and terminate the Pension Plan seems apparent. Actually, that issue is not even before the Court. Its relevance for present purposes, however, is that the various subclasses may approach it dirferently. For example, any pension rights of the former employees who had already retired were not a mandatory subject of collective bargaining upon the expiration of the last collective bargaining agreement. Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate Glass Co., supra. Further, to the extent the pensions of already retired former employees were a permissive subject of collective bargaining prior to impasse, the Union could have bargained such pensions away. Id., 404 U.S. at 173.

The former employees who had already retired will argue that their pension rights were vested and could not be changed. But what was vested was not the right to receive a pension for life, but only the right to participate in the Pension Plan and its trust fund according to the terms of the Pension Plan. That right they still have, and upon the Plan's

termination their rights thereto vested. That the trust fund contains insufficient monies to pay their expectancies is, perhaps, unfortunate but is not a breach of the collective bargaining agreements.*

The subclass of former employees who had not yet retired also argue that their pension rights had "vested" prior to their respective retirements. First, the then applicable law required no such thing. Second, the only references in the last collective bargaining agreement to vesting appear in Section 2 of Article XVIII, and those provisions provide vested rights at age 62 only for certain 25-year employees who had left Hickok but had not retired prior to age 62.**

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*It must be remembered that the Pension Plan here under consideration was both established and terminated prior to the Employee Retirement Income Security Act of 1974, better known as the Pension Reform Act of 1974, Pub. L. 93-406. In fact, termination of the Hickok Pension Plan was brought to the Senate's attention as an example of then lawful activity claimed to be in need of reform. 118 Cong. Rec. S 17200-01 (1972) (Remarks of Senator Javits). There is no allegation here that Hickok failed to abide by the law as it existed prior to the Pension Reform Act, and appellants presumably concede that the Hickok Plan's funding and vesting standards complied with the then-applicable law.

**"A twenty-five (25) year continuous service employee shall have vested rights to pension payments under the funded pension plan at age sixty-two (62) if he has left the Company prior to his sixty-second (62) birthday through no fault of his own. . . .

"An employee with a minimum of twenty-five (25) years' continuous service shall have vested rights to a pension under the funded pension plan at age sixty-two (62) if he left the employ of the Company for any reason, except discharge for just cause based on bad conduct, prior to his sixty-second (62nd) birthday. . . ."

Even then, the vested rights are not rights to receive a pension for life, but only rights to participate in the Pension Plan according to its terms. Because the subclass of not-yet retired persons involved here (Schedule B to the motion papers, Record Item 6) were still employees, these "vesting" provisions are inapplicable to them.

So, too, there is a difference in the positions that will or might be taken by 25-year employees who had not yet retired and 15- to 25-year employees* who had not yet retired who have reached age 62 but are less than age 65. Section 1 of Article XVIII of the last collective bargaining agreement provides, in part, that an employee has pension entitlement (ignoring, for the moment, the source of payment of any entitlement) "after fifteen (15) years of service to a maximum credit of thirty (30) years of service . . . at age 65. Retirement at age 62 is optional . . . if the employee qualifies with 25 years of service." In other words, two

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*Section 1 of Article XVIII of the last collective bargaining agreement provides that "No Pension shall be granted to any retiring employee with less than fifteen (15) years of service." Appellants do not contend that less than 15-year employees are entitled to pensions, and appellants do not purport to represent any such employee.

categories of employees had pension entitlement: those who were age 65 and had 15 years of service and those who were age 62 and had 25 years of service. A 15-year age 62 employee has no pension entitlement at all. Similarly, Section 2 of Article XVIII refers to the vesting rights of certain 25-year former employees at age 62.

Despite this seeming bar to the success of 15- to 25-year employees of age 62-65, appellants purport to represent 17 of such persons. The listing of these persons, which includes no named plaintiff at all, is at page B-6 of Schedule B attached to the motion papers below, Record Item 6. But that subclass will be making arguments that differ from those of the other subclasses.

Of course, the real conflict in interests among the various subclasses, which stems from their differing arguments as to their respective entitlements, is that they may limit each other's recoveries, if any.* The pension trust fund is, after all, finite, and an increase in the number of people sharing in its assets will necessarily decrease the amount available to each. For example, if the subclass of not-yet-retired former employees is held to have vested rights to receive pensions, and if the source of funding of these vested rights is held to be the pension trust fund, then the amount in the fund available for the already-retired former employees must diminish correspondingly.

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*Presumably the different arguments as to pension entitlements will remain different in arguing as to the source of funding of any entitlements.

Appellants attempt to counter this fact by arguing that they do not seek recovery from the admittedly finite pension trust fund. Rather, they claim to be seeking recovery from the Hickok corporate treasury under the terms of the collective bargaining agreements. But appellants' position ignores the words of the last collective bargaining agreement, which obligated Hickok not to pay pensions, but only to maintain a funded pension plan. Further, appellants' position ignores the substantially different arguments that will have to be made by each of the subclasses. As the Supreme Court has noted, active and retired employees "plainly do not share a community of interests." Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate Glass Co., supra, 404 U.S. at 173. Past employees and present employees have been found to constitute distinct subclasses in Ostapowicz v. Johnson Bronze Co., supra, 54 F.R.D. at 466.

Appellants might have argued that any conflict or differences among the subclasses are potential only and need not be recognized until they each develop their differing legal positions. That some of the subclasses might lose on the merits does not, of course, necessarily mean that they are in conflict with the other subclasses. But Rule 23 grants wide discretion to the District Court in considering and administering class actions and potential class actions. E.g., General Motors Corp. v. City of New York, supra, 501

F.2d at 648; Herbst v. International Telephone & Telegraph Corp., supra, 495 F.2d at 1316; City of New York v. International Pipe & Ceramics Corp., supra, 410 F.2d at 297-300.* In fact, Mr. Justice Black dissented from the Supreme Court's transmittal to the Congress of the 1966 amendment to Rule 23 because the new rule granted so much discretion to the trial courts, Supreme Court Order, 383 U.S. 1031, 1034, 1035 (1966), including the discretion "to divide them [classes] up into groups at will," id. at 1035. The District Court's discretion necessarily extends to insuring that a proposed class not contain "significantly conflicting interests." Handwerger v. Ginsberg, supra, slip op. at 4869. Here, the District Court, aware that the various subclasses would be making different arguments that might directly lead to a serious conflict, held that there is "a danger of lack of protection for all of the subclasses." Record Item 9. Delaying recognition of the potential conflicts among these subclasses until one or more of the subclasses actually lose on the merits would distort Rule 23(c)(4)'s mandate that such differences be recognized whenever, in the District Court's discretion, such recognition is "appropriate."

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*In City of New York v. International Pipe & Ceramics Corp., supra, 410 F.2d at 297, this Court thought it significant, in weighing the District Court's discretion, that a single District Judge had been assigned to the case for all purposes, under the then-existing Rule 2 of the local rules of the District Court for the Southern District of New York. As the Court knows, of the three District Judges appointed to the District Court for the Western District of New York, only Judge Burke regularly presides in Rochester, the other two presiding in Buffalo. In other words, the District Court for the Western District of New York already has its own single-assignment system, at least for cases, such as the instant one, involving only Rochester counsel and assigned to be heard in Rochester.

Actually, the District Court went so far as to inform appellants how to overcome these potential conflicts. All the court below held was that there was no showing that the various subclasses would be adequately represented "under the present posture of this case." The "present posture" referred to is, we submit, the unified legal representation of all the subclasses by the same counsel. Except for the subclass of 15- to 25-year employees, each subclass is represented by a different named plaintiff, but they are all represented by the same counsel. Although we respect their dedication and integrity, we submit that neither they nor the members of the various subclasses should be placed in a situation in which the interests of one subclass we have to be -- or even might have to be -- sacrificed to the interests of another subclass. See Guttmann v. Braemer, 51 F.R.D. 537 (S.D.N.Y.) 1970). The instant case is unlike Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966), for example, where potential subclasses were separately represented and the court was able to direct counsel to attempt to reconcile any differences. 41 F.R.D. at 384. After all, the ability of a class' attorney to represent all the members of the class is one element of Rule 23(a)(4)'s requirement of adequate representation. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562, (2d Cir. 1968).

All the named plaintiffs needed to do, then, was to have obtained separate counsel to develop the separate and possibly conflicting arguments on behalf of each subclass. If appellants had chosen that option, the risk of

inadequate representation would have disappeared. Appellants ignored the District Court's advice and, instead, have come to this Court.

In the instant case, the putative subclasses have more than a mere "disparity of interest." Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273, 278 (S.D.N.Y. 1970). Recovery by one subclass may substantially and directly reduce any recovery of another subclass. Under such a circumstance, we submit that it cannot be said that the interests of all members of each subclass are adequately protected, as required by Rule 23(a)(4). Guttmann v. Braemer, supra.

IV

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE NAMED PLAINTIFFS SHOULD SHOW A PERSONAL INTEREST IN PURSUING THE CASE ACTIVELY.

The last ground on which the District Court denied class action status was that there was "no showing that any of the named plaintiffs are personally interested in pursuing this case actively." In that the District Court was quite correct.

Appellants briefly contend that a requirement of active personal interest does not exist in Rule 23 and was arbitrarily invented by the District Court. (Appellants'

Br. 15). They, not the court below, are clearly erroneous. Rule 23(a)(4) requires a showing that the named plaintiffs "will fairly and adequately protect the interests of the class," and the named plaintiffs must satisfy each Rule 23 element with a "positive showing." DeMarco v. Edens, supra, 390 F.2d at 845.

We do not contend for, and the District Court did not impose, an inflexible requirement that a named plaintiff must necessarily submit an affidavit. But appellants sought below to occupy a fiduciary position with respect to persons not before the court, and at least some showing of actual interest in protecting those sought to be represented should be required. Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 434 (W.D. Mo. 1973). At least part of the representation whose adequacy is measured by Rule 23(a)(4) is, after all, that afforded by the named plaintiffs. "The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives." In re Goldchip Funding Co., 73-74 CCH Fed. Secs. Law Rptr. ¶ 94,382 at 95,322 (M.D. Pa. 1974).

Appellants place great weight on the fact that they are former Union officers or representatives. But if that fact is relevant, and if adequacy of representation is to be measured by treating the case as in reality a Union-

sponsored action, then it is also relevant that the Union is no longer active, Moving Affidavit (Record Item 6) ¶ 7, and "for all practical purposes, is defunct," Affidavit in Support of Motion in this Court to Dispense with Appendix and for Leave to File Typewritten Briefs ¶ 6.

Appellants also rely on the statement in the moving affidavit below (Record Item 6) that they will be adequate representatives. But that affidavit was not made by appellants or any of them; rather, it was made by their attorney.* The proffered representation whose adequacy must be measured pursuant to Rule 23(a)(4) is, however, the representation that can be afforded by appellants. It is they who sought below to be class representatives, and it is they who bore the burden of presenting a "positive showing," Demarco v. Edens, supra, 390 F.2d at 845, of their adequacy.** Rather than meeting -- or even attempting to meet -- their burden, appellants themselves have done nothing.***

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*There are repeated references in Appellants' Brief to "plaintiffs-appellants affidavit" (13, 14, 16) or "their affidavit" (13) or "their reply affidavit" (5). Both affidavits were made by appellants' attorney, and such references are simply wrong.

**Appellants complain (Appellants Br. 13) that Hickok presented no affidavits to refute their attorney's allegations. The burden, however, was on them, not on Hickok. Philadelphia Elec. Co. v. Anaconda American Brass Co., supra; Carroll v. Associated Musicians, supra; see In re Goldchip Funding Co., supra, 73-74 CCH Fed. Secs. Law Rptr. at 95,323.

***Even the affidavit in this Court in support of appellants' motion to dispense with an appendix and for leave to file 10 typewritten briefs was signed by appellants' attorney rather than by any of appellants.

Last, appellants rely on the allegations in the complaint that they will be adequate representatives. (Record Item 2 ¶ 21). But that formalistic pleading is no more controlling than Hickok's answer's denial of knowledge or information. (Record Item 3 ¶ 3).

V

AS TO TWO OF THE PUTATIVE SUBCLASSES, THERE WAS NO SHOWING THAT JOINDER IS IMPRACTICAL; AS TO ONE OF THEM, THERE IS NO NAMED PLAINTIFF TO REPRESENT THE SUBCLASS.

Rule 23(a)(1) requires a showing that the subclass "is so numerous that joinder of all members is impracticable." Putting aside the possible argument that the Union could probably easily arrange for joinder of all its former members, at least two of the putative subclasses have clearly failed to make the showing required by Rule 23(a)(1).

Schedule C to the moving papers (Record Item 5) lists a putative subclass of former Hickok employees who had retired because of disability. The list includes only 3 people, including plaintiff Taylor; the address of each is in Rochester, New York. Page B-6 of Schedule B to the moving papers (Record Item 5) lists a putative subclass of former employees who

had worked 15-25 years and were age 62-65. The list includes 17 people, including no named plaintiff; all of the addresses but one are in the Rochester, New York, area.

We submit that there has been no showing, with respect to those two putative subclasses, that joinder is impracticable. A putative class of only 18 franchisees has been held to be inadequately small. Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 130-31 (E.D. Pa. 1972). This Court has held that a putative class of 16 is inadequately small, "especially where it appears that most, if not all, of said group live in the same geographical area as the plaintiffs." DeMarco v. Edens, supra, 390 F.2d at 845.

An additional reason for affirming the District Court's order with respect to the putative subclass of 15- to 25-year former employees age 62-65 is that no named plaintiff is a member of the subclass. The only unretired named plaintiff is appellant Schulz, and he had 25 years of continuous service. He is not in a position to represent the subclass of former 15- to 25-year employees, since he is not a member of that group. Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972); Abercrombie v. Lum's Inc., 345 F. Supp. 387, 393 (S.D. Fla. 1972).

CONCLUSION

For the reasons given above, we respectfully ask this Court to dismiss the instant appeal for lack of appellate jurisdiction or, if the appeal is considered on its merits, to affirm the District Court in all respects.

Dated: Rochester, New York
August 7, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL JELFO, JOSEPHINE TAYLOR, and EDISON C. SCHULZ, on behalf of themselves and all others similarly situated,

Appellants,

-against-

HICKOK MANUFACTURING COMPANY, INC.,

Appellee,

Docket No. 75-7263

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF MONROE) SS.:

MICHAEL O'NEILL, being duly sworn, deposes and says that he is a resident of the Town of Canandaigua, New York; is over eighteen years of age, and is a messenger for the firm of Harris, Beach and Wilcox, attorneys for the appellee herein; that on the 7th day of August, 1975, before 5:00 P.M., deponent served two (2) copies of the annexed Brief for Appellee upon

Snyder and Snyder, 31 East Main Street, Rochester, New York,

by leaving said copies of the Brief for Appellee with Paul I. Snyder, Esq.

Michael O'Neill
MICHAEL O'NEILL

Sworn to before me this
7th day of August, 1975.

Carol H. Berger

CAROL H. BERGER
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 19 76